IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K. HEMA

WEDNESDAY, THE 30TH AUGUST 2006 / 8TH BHADRA 1928

CRL. A. No. 1716 of 2006

AGAINST THE ORDER IN M.C. 30/2006 IN S.C. 76/1992 DATED 05.08.2006 of SESSIONS COURT, TRIVANDRUM

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APPELLANTS/ COUNTER PETITIONERS:

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1. **MEENA ASOK, D/O. BHASURA DEVI,**
   BHADRA VEEDU, VANROSE JUNCTION,
   VANCHIYOOR VILLAGE, THIRUVANANTHAPURAM.

2. **SREEKUMARAN NAIR, S/O. KRISHNA PILLAI,**
   GIRIJA BHAVAN, ENIKKARA,
   KARAKULAM VILLAGE, THIRUVANANTHAPURAM.

BY ADV. SRI. SUMAN CHAKRAVARTHY

RESPONDENT/PETITIONER:

STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM.

BY PUBLIC PROSECUTOR SMT. P.A. RAZIYA.

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 30/08/2006 ALONG WITH CRL. APPEAL NOs. 1717&1718/06, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. HEMA, J.

CRL.A. NOs. 1716, 1717 & 1718 OF 2006

Dated this the 30th day of August, 2006.

J U D G M E N T

Appellants are same in all the appeals. They were sureties to one of the accused in different Sessions Cases, who executed bond for different amounts for appearance of the accused before the court. The first appellant is none other than the daughter of the accused. The accused failed to appear before the court and hence non-bailable warrant was issued. It was returned unexecuted. The court, thereafter, issued a show cause notice under Section 446 of the Code of Criminal Procedure to appellants calling upon them to show cause why bond amount should not be forfeited to the Government. On receipt of the notice, they appeared before the court and expressed their inability to produce the accused. They filed a statement in writing contending that the accused was no more. They also requested the court to conduct an enquiry into the matter. They also stated that the absence of the accused was not willful. The second appellant was working as a subordinate of the accused while he was working as an officer in the Kerala University. He also filed a written explanation on getting the show cause notice issued to him.

2. The court below found that the fact that counter petitioners were sureties of the accused is not in dispute. The court also held that the fact that the accused for whom they stood as sureties defaulted conditions of bail is also not disputed and hence the counter petitioners forfeited the bond. The trial court found that there was no mitigating circumstances to remit any portion of the bond amount or to reduce the proposed penalty and they cannot be exonerated from payment of penalty. The case was disposed of by imposing a penalty of Rs. 10,000/- each on appellants, and giving them one month's time to pay penalty, failing which coercive steps were ordered to be initiated against them. The said order is under challenge in these appeals.

3. A reading of the impugned order shows that it is per se illegal. One of the most essential requirements for initiation of proceedings against the sureties under Section 446(1) of the Code is the 'forfeiture of the bond' by the person who executed bond. To constitute forfeiture, there must be willful default on the part of the accused in not appearing before the court, in violation of the conditions of the bond. The default, in this context, has to be willful default, since the forfeiture will lead to penal consequences. The court, therefore, is bound to look into the question whether there was willful default on the part of the accused or not, and whether he had willfully

absented himself from appearing before the court. It is to be borne in mind that the sureties are also made liable under the provisions only on account of the default of another person, that is the accused. Therefore, the duty and responsibility cast upon court is greater in satisfying itself that the bond has been forfeited, on account of willful default on the part of accused.

4. On going through the order under challenge, it is clear that the court has not applied its mind to the above facts at all. It can be seen from the order that warrant was issued against accused and it was returned unexecuted. Under what circumstances it was returned so are not stated in the order. Whether the accused was available or not, or whether he was willfully avoiding warrant or whether summons was actually served or whether there was any specific reason for his non appearance or non execution of the warrant etc. were not looked into by the court at all.

5. A non-bailable warrant can be returned unexecuted under various circumstances. It may be because the accused is avoiding the warrant. It may be because, warrant cannot be executed since he is absconding. It may be because, he is sick and laid up. It may be because, he is in such a condition that it is impossible for the police to produce him to the court. There can be various reasons for non-

execution of a non-bailable warrant. It is the reason for non-execution of the warrant, which is relevant in this context. But, the court below has not ascertained the reason.

6. It is submitted that appellants had brought to the notice of the court below that the accused is no more. They had also called upon the court to make an enquiry into this aspect, since according to them, he is no more. Details are also shown in the explanation submitted by them in writing, pursuant to the show cause notice. But, lower court failed to look into any of these aspects and did not even ascertain why warrant was returned unexecuted. Unless and until a probe is made into this aspect, no court can satisfy itself that accused is willfully defaulting or willfully absenting from the court. If there is no willful default, as appellants would contend, because accused is no more, court below will not have the jurisdiction to proceed any further under Section 446(1) of the Code.

7. In this context, it is also relevant to note that Section 446(1) of the Code mandates the court to record the grounds of proof of satisfaction that the bond has been forfeited. It is not sufficient that the court finds that the bond is forfeited. The court has also to confirm that there is proof of this fact. The court below must be satisfied that there is "proof" that bond is forfeited. If there is "proof" to the

satisfaction of court that bond has been forfeited, the court shall record grounds of such proof. It is only after exercising all these functions that a court can proceed further under Section 446(1) of the Code. Any order passed without complying with this mandate under Section 446(1) of the Code makes the order illegal.

8. The court has failed to consider whether there is proof that the bond has been forfeited as required under Section 446(1) of the Code. But, the court entered a finding that accused for whom the appellants stood as sureties defaulted the conditions of bail granted to him is not under dispute. This finding itself is not supported by the materials placed before court. Infact, appellants raised a dispute in writing before court below. The alleged willful default of appellants has been disputed in the sense that according to appellants, accused is no more and hence he cannot appear. Therefore, the finding of the court on fact that there was no dispute that the accused willfully defaulted the conditions of the bond also is not correct.

9. If the contention raised by appellants is accepted, it may be possible to hold that the accused did not commit any default because of his non appearance in court. Atleast, the court below ought to have verified from records for what reason the warrant was returned unexecuted. The court did not verify any of these facts, but proceeded

on the assumption that the default was not a disputed fact. Thus, the court below committed a serious error on facts also.

10. The lower court found that the claim of the petitioners that the accused is not heard for the past ten years and they are liable to be exonerated from payment of penalty is without any merit. The basis for entering such finding is that the accused was conducting appeal before this Court, which was disposed of only in November 2005. Learned counsel appearing for appellant pointed out that the said appeal was filed in 1993 and a counsel was engaged for accused and the case was disposed of without knowing whether accused was alive or not. But such lack of information of counsel also may not be a sufficient ground to hold that accused was alive, if as a matter of fact, he is no more. At any rate, in the light of specific contentions raised in the statement filed by the appellants that accused is no more, the court ought to have considered the fact whether accused willfully defaulted in appearing before the court or not. Such an exercise was not made in this case and hence it makes the order illegal.

11. It can also be seen that the court proceeded to issue notice under Section 446 of the Code calling upon the sureties to show cause why "the bond for Rs. 10,000/- each executed by them should not be forfeited to the Government". The court is not expected to call upon

the sureties to show cause "why bond should not be forfeited". It is only after the court is satisfied that the bond has been forfeited, the question of issuance of a show cause notice under Section 446(1) of the Code arises at all. The notice which is contemplated under Section 446(1) of the Code, is to call upon the sureties to pay the penalty or to show cause why penalty shall not be imposed. Such a notice also does not appear to have been issued in this case. Even if it is issued, lower court did not consider relevant aspects in the right perspective. It is clear from the facts narrated above that court below proceeded to issue show cause notice, even before satisfying itself that bond has been forfeited. That is what is reflected from the observations that the sureties were called upon to "show cause why the bond for Rs. 10,000/- each executed by them should not be forfeited".

12. In the above circumstances, the entire proceedings are illegal and not consistent with the procedure laid down under Section 446 of the Code. Therefore, order under challenge is liable to be set aside and I do so. The court below shall strictly follow the procedure under Section 446 of the Code before proceeding to recover penalty. The court must be satisfied whether there was willful default and thereby bond has been forfeited. The court must thereafter call

upon sureties to pay penalty which they had incurred by the reason of such forfeiture of bond. The court shall also record grounds of proof of satisfaction that the bond has been forfeited. The court shall thereafter call upon the sureties to pay penalty or to show cause why the penalty (which has already incurred in the matter) shall not be paid. In the absence of doing any of these things, the court shall not impose penalty.

The impugned orders in these appeals are set aside. The matter is remanded to the court below for fresh consideration and disposal in accordance with law, after strictly complying with the procedure laid down in Section 446 of the Code, within two months of receipt of copy of this judgment.

These appeals are admitted with notice to the learned Public Prosecutor. Heard both sides and these appeals are allowed.

K. HEMA, JUDGE

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